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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK ANTHONY SANCHEZ,

Defendant and Appellant.

H026365

(Santa Clara County

Super. Ct. No. CC111849)

Pursuant to a plea agreement, defendant Frank Anthony Sanchez pleaded no contest to 10 felonies and one misdemeanor, and admitted a prior strike conviction in exchange for an agreed upon state prison term of between 11 years and 16 years 4 months.

In the middle of his sentencing hearing, defendant expressed his desire to withdraw his plea. The trial court failed to address defendant's request, and continued to sentence defendant. Judgment was entered.

On appeal, defendant asserts he was entitled to be heard on his request to withdraw his plea. We find the trial court erred in failing to consider defendant's request, and we remand the matter for the limited purpose of allowing defendant to file his motion to withdraw his plea.

STATEMENT OF THE FACTS AND CASE¹

By information filed in August 2002, defendant was charged with assault on a peace officer with a deadly weapon (Pen. Code, § 245, subd. (c)),² driving under the influence of alcohol and drugs causing injury (Veh. Code, § 23153, subd. (a)), reckless driving while evading a peace officer (Veh. Code, § 2800.2, subd. (a)), driving under the influence of alcohol and drugs causing injury, with five multiple victim enhancements (Veh. Code, §§ 23153, subs. (a), 23558), hit and run accident resulting in injuries (Veh. Code, § 20001, subds. (a)/(b)(1)), exhibiting a weapon at a peace officer (§ 417.8), exhibiting a firearm in the presence of a peace officer (§ 417, subd. (c)), possession of a firearm by a convicted felon (§12021, subd. (a)(1)), possession of ammunition by a prohibited person (§ 12316, subd. (b)), altering the identification on a firearm (§ 12090), and using or being under the influence of a controlled substance, a misdemeanor (Health & Saf., § 11550, subd. (a)). The information also alleged defendant had a prior conviction of attempted murder, which was both a strike and a serious felony conviction. (§§ 667, subds. (b)-(i), 1170.12, 667, subd. (a).).

Pursuant to a plea agreement, defendant pleaded no contest to all counts and admitted the enhancements in the information, for an agreed upon sentence of between 11 years and 16 years four months in state prison. The People agreed to dismiss the allegations of injuries as to three persons in the driving under the influence causing injury charge. Defendant filed a motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, requesting that the court dismiss his prior strike conviction in the interest of justice. The court denied the motion, and sentenced defendant to the probation department's recommendation of 16 years 4 months in state prison.

¹ We state only the facts that are relevant to defendant's limited issue on appeal regarding whether the trial court erred in failing to consider defendant's request to withdraw his plea.

² All further statutory references are to the Penal Code unless otherwise stated.

At defendant's sentencing, the court indicated defendant would receive 361 days of actual credit, and 180 days of conduct credit for a total of 541 days of credit for time served in custody. During defendant's sentencing hearing, the probation department represented to the court that defendant was not entitled to a year of credit for time he served in custody, because defendant's parole violation involved mixed conduct, making defendant ineligible for dual credits. Upon hearing that he would not receive credit for all the time he had spent in custody, defendant told the court he wished to withdraw his plea. The court did not address defendant's request, and continued to complete the sentencing. Judgment was entered, and defendant filed a timely notice of appeal.

DISCUSSION

Defendant asserts on appeal that the trial court erred in failing to consider his request to withdraw his plea. Section 1018 allows a defendant to move to withdraw his plea of guilty or no contest on a showing of good cause any time before entry of judgment. In addition, section 1018 states: "[t]his section shall be liberally construed to effect these objects and to promote justice."

Here, the record demonstrates that the court never considered defendant's request to withdraw his plea. In the middle of pronouncing sentence, the court asked the probation officer to state the amount of custody credits to which defendant was entitled. The probation officer represented that defendant was not entitled to a year of credit, because the parole violation involved mixed conduct, making defendant ineligible for dual credits. When he learned he would not receive all the credits to which he believed he was entitled, defendant stated: "I wish to withdraw my plea if that's the case" The court conducted a brief conversation with defendant regarding the custody credits, and when defendant repeated his request, stating: "I wish to withdraw my plea and go to trial . . . ," the court simply responded: "I understand what you are saying." The court then continued to advise defendant of his parole period, and concluded the hearing. The court's colloquy with defendant did not amount to consideration of defendant's request to

withdraw his plea. At the very least, the court should have given defendant the opportunity to discuss the matter with his counsel, and set a briefing and hearing schedule for the motion.

Here, the court's failure to consider defendant's request to withdraw his plea violated defendant's fundamental rights to a jury trial, and to testify on his own behalf. A defendant's request to withdraw his plea vests entirely in him, and does not need the concurrence of his counsel as being in his best interest. (See *People v. Osorio* (1987) 194 Cal.App.3d 183 (*Osorio*); *People v. Brown* (1986) 179 Cal.App.3d 207.) Moreover, "the right to seek to withdraw a guilty plea implicated the defendant's fundamental rights to a jury trial and to testify in his own behalf." (*Osorio, supra*, 194 Cal.App.3d at p. 188.) In this case, the court failed to consider defendant's request, continuing to sentence defendant and ultimately, entering judgment. This violated defendant's constitutional rights.

The People assert defendant's request was untimely, because it occurred during the sentencing hearing, which, in the People's view, constituted rendering of judgment. However, what the People fail to recognize is the fact that in this case, defendant expressed his desire to withdraw his plea *before* the court completed sentencing. Therefore, judgment was not yet pronounced, and the request was timely under section 1018.

In addition, the People's argument that the court considered defendant's request and impliedly denied it is equally unpersuasive. There is nothing in the record before us to demonstrate that the trial court considered defendant's request. When defendant stated that he wished to withdraw his plea, the court did not inquire into defendant's understanding of the plea agreement, or whether defendant's plea was as a result of "[m]istake, ignorance, or any other factor overcoming the exercise of free judgment" (*Brown, supra*, 179 Cal.App.3d at pp. 213-214.) Moreover, the court did not conduct any

hearing, and did not rule on the request. As such, we find the court did not consider defendant's request, and did not impliedly deny it.

In sum, the trial court erred in failing to consider defendant's request to withdraw his plea. The matter must be remanded to the trial court to give defendant the opportunity to pursue his motion to withdraw his plea.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for the limited purpose of allowing defendant to file his motion to withdraw his plea pursuant to section 1018.³ If defendant does not file a motion, or files a motion that is denied, the trial court shall reinstate the judgment.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.

³ Because we remand the matter for defendant to pursue his motion to withdraw his plea, we need not consider whether defendant's additional contention that he has good cause to withdraw his plea. Additionally, in light of the disposition of this appeal, the issue defendant presents in his supplemental brief regarding the propriety of consecutive sentencing under *Blakely v. Washington* (2004) 542 U.S. ____ [124 S.Ct. 2531], is moot.